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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GAIL JOHNSON-McINTYRE,

Plaintiff and Appellant,

v.

BNC MORTGAGE, INC. etc., et al.,

Defendants and Respondents.

B200061

(Los Angeles County  
Super. Ct. No. YC050841  
Consolidated with YC054052)

APPEAL from a judgment of the Superior Court of Los Angeles County, Andrew Kaufman, Judge. Reversed in part; affirmed in part; disposition stayed as to Defendant and Respondent BNC Mortgage, Inc. only.

Law Offices of Tshombe Sampson and Tshombe Sampson for Plaintiff and Appellant.

Jay S. Belshaw for Defendant and Respondent Ronnie L. Breaux.

Houser & Allison, Eric D. Houser and J. Owen Campbell for Defendant and Respondent, BNC Mortgage, Inc.

## INTRODUCTION

Plaintiff Gail Johnson-McIntyre appeals from the judgment entered against her after the trial court sustained the demurrer of defendant BNC Mortgage, Inc. (BNC), in which defendant Ronnie L. Breaux had joined, and denied her leave to amend. We reverse the judgment with respect to the causes of action for (1) cancellation of instruments alleged against BNC and (2) intentional infliction of emotional distress alleged against Breaux. In all other respects, we affirm the judgment. Since oral argument in this case, we have been informed that BNC has filed for Bankruptcy Court protection. Accordingly, the disposition herein with respect to BNC only is stayed pending notification from the Bankruptcy Court.<sup>1</sup>

## FACTUAL AND PROCEDURAL BACKGROUND

Gail<sup>2</sup> filed her original complaint in April 2005. For purposes of review, we assume the truth of the following allegations extracted from the first amended complaint (*Gilmer v. Ellington* (2008) 159 Cal.App.4th 190, 194, fn. 1): In November 1994, Gail and William McIntyre, then married, acquired property located at 4097 West 138th Street in Hawthorne, California (the property) using community property funds. The property was held *in the name of William only*, the complaint alleged, because Gail owed student loans and the couple did not want to risk having the student-loan creditor put a lien on the property. While married, the couple paid the mortgage from community property funds. In October 2000, William filed for divorce and moved out of the house. Thereafter, Gail made mortgage payments on the property from her separate property funds. In April 2001, the parties stipulated to, and the family law court ordered, that Gail have “temporary use, possession and control of” the property.

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<sup>1</sup> This opinion is being filed as a unitary opinion because it was briefed and argued in a unitary fashion. However, as the result of the stay in BNC’s bankruptcy (11 U.S.C. § 362(a)(1)) our opinion herein is a tentative decision as to BNC only and will be made final as to BNC upon notification to this Court that the automatic stay has been lifted.

<sup>2</sup> We refer to the Johnson-McIntyre couple by their first names for clarity and mean no disrespect thereby.

Beginning in the summer of 2004, the complaint alleges, and continuing for several months, Breaux repeatedly made offers to Gail and William, separately, to purchase the property for substantially below market value. Both Gail and William rejected the offers, informing Breaux that the property was jointly owned and that Gail had exclusive possession and control over it. However, the complaint alleges, in February 2005, Breaux or Angela Cotton doing business as Victory Escrow, submitted a forged document to Ameriquist Mortgage seeking information about Gail's mortgage on the property. Both Gail and William, the complaint alleges, were unaware of Breaux's and Victory Escrow's request and forgery. Ameriquist rejected the request noting that the signature on it did not match the one on file.

Also in February 2005, the complaint alleges, Breaux convinced William to sign some documents to "get the sales process started." William stated he had no intention of selling the property, did not know what he was signing, and did not know he was signing any documents that would constitute a sale of his property or an agreement to sell. Breaux then told Gail that William had agreed to sell the property and she was powerless to stop him. Prompted by her conversations with Breaux, Gail recorded a lis pendens on the property on April 4, 2005. The lis pendens states the fact of the dissolution of Gail's and William's marriage and declares that the property is "affected by this [dissolution] action." Within a few days after the lis pendens was recorded, Breaux and Victory Escrow's Cotton secretly offered Gail \$20,000 to let the sale go through and threatened litigation if she did not accept the demand. Gail rejected the offer.

The complaint then alleges that in April 2005, Breaux submitted an application to BNC for a loan in the amount of \$376,000 and a second loan of \$97,000 for his purchase of the property. Citing BNC's first amended complaint (*BNC v. Victory Escrow* (Case No. YC050841)), Gail alleges that BNC admitted Breaux applied to it for a loan.

On April 14, 2005, BNC funded the loan to Breaux. BNC thought the loans were secured by deeds of trust on the property.<sup>3</sup>

Breaux recorded a deed conveying title to the property from William to Breaux. The complaint alleges that William's signature is forged. In May 2005, Gail obtained a temporary restraining order from the family law court protecting the property from "further alienation," and ordering Breaux to keep payments on the property current and not to let the property fall into foreclosure.

Then, in June 2005, Breaux filed an unlawful detainer action against Gail to evict her from the property. The complaint alleges that Breaux admitted in his pleadings in Gail's divorce that the deed to him was forged. Breaux conveyed title to the property back to both William and Gail in November or December 2006.

Gail then brought the instant action against Breaux and BNC, among others. The complaint alleges that all defendants were "partners" "as that term is defined by Black's Law Dictionary, and each is jointly and severally liable for the acts of the other defendants." She alleges that by funding the loan, BNC acted in concert and as partner to transfer title from William to Breaux. The loans were made with constructive knowledge of her *lis pendens* (Code Civ. Proc., § 405.24). The complaint also alleges that BNC and defendants were united for the purpose of sharing the benefits from the illicit transfer of the property from William to Breaux. Gail alleged five causes of action: cancellation of all instruments, fraud against all defendants, negligence against BNC, intentional

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<sup>3</sup> BNC's own lawsuit against Breaux, Victory Escrow, Cotton, and William, among others, was brought in May 2005 a month after Gail brought her original complaint. BNC's complaint alleged that Victory Escrow and others altered the title report on the property so that neither the McIntyre dissolution nor the *lis pendens* on the property was disclosed to BNC. BNC alleges that it funded the loans without knowledge that the title report had been altered. BNC issued a loan of \$470,000 and after paying off the existing \$203,000 mortgage on the property, the difference was approximately \$267,000. Gail cited BNC's complaint in various places in her complaint and so BNC's complaint was before the trial court at the time it ruled on the demurrers at issue here.

infliction of emotional distress against all defendants, and negligent infliction of emotional distress against BNC.

BNC demurred to Gail's first amended complaint and Breaux joined in that demurrer. The trial court sustained BNC's demurrer and separately sustained BNC's demurrer as to Breaux. The court then dismissed Gail's complaint with prejudice for failure to state facts sufficient to constitute a cause of action.<sup>4</sup> Gail's appeal followed.<sup>5</sup>

### CONTENTIONS

Gail contends that the trial court abused its discretion in sustaining BNC's demurrer to her complaint without leave to amend.

### DISCUSSION

#### 1. *Standard of review*

"A demurrer lies only for defects appearing on the face of the complaint or from matters of which the court must or may take judicial notice. [Citation.]" (*Ramsden v. Western Union* (1977) 71 Cal.App.3d 873, 879.) For the purpose of determining the effect of the complaints, their allegations are liberally construed, with a view toward

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<sup>4</sup> Just as he joined in BNC's demurrer, Breaux has joined in BNC's brief on appeal on the ground that he "stands in the same legal position as respondent BNC Mortgage Inc. and therefore, makes identical legal arguments . . . ."

<sup>5</sup> The record on appeal did not include Gail's operative complaint, BNC's demurrer, or the reporter's transcript. Appellant filed a motion to correct and augment the record and lodge two volumes of documents. Among the documents included are the original and first amended complaint. However, none of the documents in that two-volume set was number stamped or properly indexed. Appellant bears the burden to show a sufficient record for reversing the order or judgment from which the appeal is taken. (*Buckhart v. San Francisco Residential Rent Etc., Bd.* (1988) 197 Cal.App.3d 1032, 1036.) As part of that burden, the appellant must provide this court with an adequate record to assess error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) Error is never presumed; the presumption favors the correctness of the lower court's judgment or order. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532.) Accordingly, we ordered Gail to provide this court with the appropriate documents and to number stamp them.

substantial justice. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 43, fn. 7.)

“In reviewing the sufficiency of a complaint against a general demurrer . . . we [must] determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

2. *Gail has alleged standing.*

BNC contends, where Gail’s complaint asserts that the property was held in William’s name only, that she did not have title and hence had no standing to bring this action. BNC is wrong.

“ ‘Every action must be prosecuted in the name of the real party in interest . . . .’ [Citation.] ‘Generally, “the person possessing the right sued upon by reason of the substantive law is the real party in interest.” [Citations.]’ [Citation.]” (*Gantman v. United Pacific Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566.) Gail alleges that she is living on the property and that she is an owner because the property was purchased by the marital community, she continues to pay the mortgage on the property with her separate property funds, and the family law court granted her temporary possession of the property. Thus, Gail has alleged both a possessory and ownership interest in the property although her interest is not of record. (Cf. Fam. Code, § 1102.) Even if the trial court eventually awards the property to William in the dissolution, Gail has alleged sufficient facts of both her possessory interest and her interest in the community at the time of Breaux’s and BNC’s alleged conduct to give her standing here.

3. *The trial court did not abuse its discretion in sustaining BNC’s demurrer to the fraud cause of action without leave to amend.*

Gail’s second cause of action, entitled fraud, alleges that Breaux forged William’s name on the request for information about William’s mortgage and on the deed. Breaux deceived William into signing a purchase and sale contract by stating that the documents

were “just preliminary.” Breaux recorded the forged deed with the intent to deceive Gail into agreeing to the sale and so that he could obtain title to the property at substantially below market value. BNC funded the loans, the complaint alleged, after her *lis pendens* was recorded and “partnered with Breaux, Victory and Cotton in this transaction which had the practical effect of aiding and abetting Breaux in the commission of Breaux’s fraud.” As a partner, BNC is liable for Breaux’s fraudulent acts. As the direct result of BNC’s and Breaux’s fraud, Gail alleges, she was deprived of her rightful ownership of the property and was forced to incur legal fees.

“The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. [Citation.]” (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990.)

As BNC notes, the only wrongful conduct Gail alleges is that an entirely different defendant, Breaux and not BNC, forged a deed to wrongfully obtain the property at below market price. All of the allegations of representations to which Gail’s brief points are representations made by Breaux and Victory Escrow. Gail does not allege any misrepresentation on the part of BNC. Gail admits that her allegations of fraud against BNC amount to the assertion that BNC aided and abetted Breaux in defrauding her and “acted in reckless disregard of [her] rights.” The only act by BNC alleged in the complaint is the funding of two loans to Breaux after the *lis pendens* was filed. But, funding a loan is not a misrepresentation and so she has not alleged the requisite element of misrepresentation as to BNC.

More important, as reprehensible as Breaux’s averred forgery and other actions were, Gail has not alleged that *she relied* on any such misrepresentation. The element of actual reliance means “ ‘that the representation was “an immediate cause of [the plaintiff’s] conduct which alter[ed][the plaintiff’s] legal relations,” and that without such representation, “[the plaintiff] would not, in all reasonable probability, have entered into the contract or other transaction.” ’ [Citations.]” (*Schauer v. Mandarin Gems of Cal., Inc.* (2005) 125 Cal.App.4th 949, 960; accord, *Cadlo v. Owens-Illinois, Inc.* (2004) 125

Cal.App.4th 513, 519, citing *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976.)

Here, *William* allegedly relied on Breaux's representations that the purchase and sale contract was only preliminary. In reliance on Breaux's statements, William executed a contract to sell the property. *BNC* allegedly relied on Breaux's forged deed and title report by lending money to Breaux. But, nowhere has Gail alleged that *she* entered into a contract or transaction because of a misrepresentation made to her. (*Schauer v. Mandarin Gems of Cal., Inc., supra*, 125 Cal.App.4th at p. 960.) On appeal, Gail notes that she alleged BNC's reliance on *Breaux's* misrepresentations and she argues that she relied on misrepresentations in that she was forced to record a lis pendens, sought a restraining order in her divorce proceeding, and brought the instant action to quiet title. However, a fair reading of her complaint indicates, rather than relying on these representations, that Gail actually *fought back against Breaux's misconduct*. After learning of the agreement to sell her property, Gail recorded a lis pendens to protect against transfer of the property and obtained a temporary restraining order to protect the property from Breaux's waste. And, Gail resisted Breaux's unlawful detainer action. In short, nothing Gail did after Breaux's fraudulent representations altered her legal relationship to the property or to Breaux. (*Cadlo v. Owens-Illinois, Inc., supra*, 125 Cal.App.4th at p. 519; *Schauer v. Mandarin Gems of Cal., Inc., supra*, at p. 960.) Consequently, Gail cannot allege a necessary element of fraud against Breaux.

Likewise, Gail cannot allege she actually relied on any representations made by BNC. Gail does not allege that BNC made any representations *to her* upon which she could rely. Gail cites *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, for the proposition that she need not be the party who relied on misrepresentations to recover for fraud. Yet, that case involved fraudulent and deceptive advertising under the Unfair Competition Law (Bus. & Prof. Code, § 17200 (the UCL)) and so it is factually and legally irrelevant. Moreover, since that case, Proposition 64 changed the UCL with respect to reliance (see *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 855-858) and so *Committee on Children's Television, Inc. v. General Foods Corp.* is



of no relevance to Gail's situation. Gail has not alleged BNC's misrepresentation *to her* or *her reliance* on a BNC misrepresentation, with the result that she has not stated and cannot state a cause of action for fraud against BNC.

4. *The trial court did not abuse its discretion in sustaining BNC's demurrer to the negligence cause of action without leave to amend.*

The third cause of action, entitled negligence, is alleged against BNC only. Therein, Gail alleges that BNC had a duty under Code of Civil Procedure section 405.24<sup>6</sup> to timely discover the recorded lis pendens and Gail's interest in the property. Gail alleges that BNC breached its duty to her by failing to timely discover the lis pendens and Breaux and Victory Escrow's forged and fraudulent documents; by funding the loan to Breaux; and by securing the loans with deeds of trust on the property based on an admittedly forged conveyance. As the result of these breaches, Gail alleges she was damaged because of the cloud on her title and because she incurred attorney fees and costs to clear title and defend her ownership interest.

The elements of a negligence cause of action are: "that (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached that duty, and (3) the breach was a proximate or legal cause of the plaintiff's injuries. [Citations.] The absence of any one of these three elements is fatal to a negligence claim. Accordingly, if the plaintiff cannot establish that the defendant owed the plaintiff a duty, the action must be dismissed. [Citation.]" (*Gilmer v. Ellington, supra*, 159 Cal.App.4th at p. 195.)

"Generally, all people are required to use ordinary care to prevent others from being injured as a result of their conduct but ' "[t]he existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to

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<sup>6</sup> Code of Civil Procedure section 405.24 reads: "From the time of recording the notice of pendency of action, a purchaser, encumbrancer, or other transferee of the real property described in the notice shall be deemed to have constructive notice of the pendency of the noticed action as it relates to the real property and only of its pendency against parties not fictitiously named. The rights and interest of the claimant in the property, as ultimately determined in the pending noticed action, shall relate back to the date of the recording of the notice."

decide. [Citation.]” ’ [Citations.]” (*Gilmer v. Ellington*, *supra*, 159 Cal.App.4th at pp. 195-196.) Among the various factors to be considered in determining the existence and scope of a duty of care are: “ ‘ “[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.” [Citation.]’ [Citations.]” (*Id.* at p. 196.)

“[A] lis pendens is a recorded document giving constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice. Its effect is that anyone acquiring an interest in the property after the action was filed will be bound by the judgment.” (*BGJ Associates v. Superior Court* (1999) 75 Cal.App.4th 952, 966, citing *Urez Corp. v. Superior Court* (1987) 190 Cal.App.3d 1141, 1144; see also fn. 5, *supra*.) Thus, the effect of Gail’s lis pendens on BNC is that BNC could not claim to be a bona fide purchaser for value and its lien on the property was necessarily junior to hers.

However, a lis pendens does not *prevent* the transfer or encumbrance of property after the date of the recording of the lis pendens. In *Stagen v. Stewart-West Coast Title Co.* (1983) 149 Cal.App.3d 114, the plaintiff sued the sellers and buyers of real property and the title company alleging that the title company failed to report the existence of the plaintiff’s earlier recorded lis pendens. (*Id.* at p. 117.) This court affirmed the judgment on the pleadings in favor of the title company stating, in particular, that the plaintiff “has not been harmed by [the title company’s] asserted negligence in omitting to report the existence of the lis pendens in the abstract prepared for buyers. As previously noted, ‘[t]he purpose of a *lis pendens* is merely to furnish a means of notifying all persons of the pendency of an action and thereby to bind any person who may acquire an interest in property, subsequent to the institution of the action, by any judgment which may be secured in the action affecting the property.’ [Citation.] [¶] A judgment favorable to the

plaintiff relates to, and receives its priority from, the date the lis pendens is recorded, and is senior and prior to any interests in the property acquired after that date. [Citations.] Thus, when [the plaintiff] recorded his lis pendens, he placed himself in a position where his rights *could not be affected by the existence of subsequent purchasers*, or the failure of the title company to report the existence of the action.” (*Id.* at pp. 122-123, first italics in original, second italics added.)

Accordingly, Gail’s lis pendens created no duty on the part of BNC *to Gail*. When she recorded her lis pendens, she put herself in a position where her rights *could not be affected by the existence of BNC’s subsequent encumbrance or the failure of BNC to discover the recorded lis pendens before recording its lien*. It was BNC who bore the risk of its failure to discover the lis pendens; but BNC did not violate a duty to her because its encumbrance is rendered inferior to Gail’s interest in the property by virtue of her lis pendens. The trial court did not err in sustaining the demurrer to Gail’s negligence cause of action against BNC and because Gail does not demonstrate how she could amend her complaint, the trial court did not abuse its discretion in denying leave to amend.

5. *The trial court erred in sustaining the demurrer to the intentional infliction of emotional distress cause of action without leave to amend as to Breaux but not as to BNC.*

In her fourth cause of action, Gail alleges that all defendants were partners and intentionally and recklessly stole Gail’s title and tried to evict her from her home thereby intentionally causing her emotional distress

The elements of a prima facie case for the tort of intentional infliction of emotional distress are: (1) the defendant engaged in extreme and outrageous conduct with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the defendant’s outrageous conduct was the actual and proximate cause of the emotional distress. (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th

736, 744-745.) To be outrageous, the conduct must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. (*Ibid.*)

To be sure, Breaux's alleged conduct in harassing Gail to sell the property, forging a deed, threatening Gail with a cloud on title, and filing an unlawful detainer action against her, if proven, is extreme and outrageous and was conduct that exceeds that tolerated in a civilized community. Gail has stated a cause of action against Breaux and the trial court err in sustaining the demurrer as to him on this cause of action.

As noted, the only actual act that she alleges BNC engaged in was to fund loans to Breaux. Funding loans, in and of itself, is not extreme and outrageous behavior. Gail responds that she has alleged that BNC was a partner with Breaux and Victory Escrow.<sup>7</sup> But, Gail has not alleged the necessary elements of a partnership. As Gail does not cite a written partnership agreement, she necessarily relies on an ostensible partnership or partnership by estoppel. (Corp. Code, § 16308.<sup>8</sup>) "A partnership need not be evidenced by a writing. It may be oral. [Citation.] And where there is no writing evidencing the agreement, the existence of a partnership may be evidenced by the conduct of the parties. [Citation.]" (*Calada Materials Co. v. Collins* (1960) 184 Cal.App.2d 250, 253.)

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<sup>7</sup> In her reply brief, Gail concedes that she does not allege the necessary elements of aiding and abetting, to hold BNC liable for Breaux's conduct.

<sup>8</sup> Corporations Code section 16308, subdivision (a) provides "If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, *the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership.* If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation." (Italics added.)

Gail contends that the existence of a partnership is a question of fact. We are at the pleading stage and so the assertion is meaningless unless she can allege the necessary elements. To allege partnership by estoppel, Gail must allege facts of estoppel. (*Moen v. Art's Café* (1950) 95 Cal.App.2d 577, 579, discussing predecessor to Corp. Code, § 16308.) “The rule of responsibility and liability . . . is founded upon the doctrine of equitable estoppel. [Citation.] A plaintiff who relies upon the doctrine of equitable estoppel . . . must plead the facts establishing such estoppel in order to be entitled to make proof of the same or to have the benefit of a finding predicated upon the section and hence sufficient to support a judgment against one who, while not an actual partner has estopped himself to deny that he is not so by his representations made in that behalf and by the reliance of the creditors of the firm thereon. [Citation.]” (*Moen v. Art's Café, supra*, at p. 579.) The elements of partnership by estoppel are that: (1) the acts and conduct of BNC and Breaux were factually and legally sufficient to lead *Gail* to reasonably believe BNC was a copartner; and (2) *Gail* relied on *BNC's* representations in entering into a transaction with the partnership. (*In re Lona* (Bankr. N.D.Cal. 2008) 393 B.R.1, 17; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Partnership, § 26, pp. 601-602; see *J & J Builders Supply v. Caffin* (1967) 248 Cal.App.2d 292, 297; cf. *Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 379 [elements of estoppel include that plaintiff relied on conduct or representations].) Gail has not alleged that BNC or Breaux represented themselves to her or engaged in any conduct such as would indicate they were partners, or that she relied on *any* representation on the part of BNC that it was a partner with Breaux, or otherwise. Nor can she allege that she relied on BNC's representations by entering into a transaction with the partnership. Therefore, she cannot allege partnership by estoppel. The trial court properly sustained the demurrer and denied leave to amend the intentional infliction of emotional distress cause of action in the first amended complaint as to BNC.

6. *The trial court did not err in sustaining BNC's demurrer to the negligent infliction of emotional distress cause of action and did not abuse its discretion in denying leave to amend.*

Gail cannot allege negligent infliction of emotional distress in her fifth cause of action because, as noted, she cannot allege the breach of a duty owed by BNC. (See *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588.) Therefore, the trial court did err in sustaining BNC's demurrer to the negligent infliction of emotional distress causes of action.

7. *The trial court erred in sustaining BNC's demurrer to the first cause of action for cancellation of instruments and abused its discretion in denying leave to amend.*

Civil Code section 3412 reads: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause *serious injury to a person against whom it is void or voidable*, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." (Italics added.)

Gail's first cause of action alleges "As a result of Breaux's admission and reconveyance of title, there is no issue as to title to the Property, nor as to whether or not the deed dated March 30, 2005, was forged. These issues are now determined and plaintiff seeks an immediate order canceling all instruments, deed and encumbrances based on the forged deed. [¶] . . . Therefore, Breaux did not have title or the right to title at the time he signed Deeds of Trust encumbering the Property in favor of BNC Mortgage. Those instruments and encumbrances are also void ab initio and must be immediately cancelled."

BNC argues that Gail has not alleged a cause of action for cancellation of instruments because she admitted that the forged grant deed into Breaux was reconveyed. While that may be true with respect to the deed into Breaux, Gail's complaint also implies that BNC's trust deeds were not canceled. She has alleged an interest in the real property. She has alleged that the trust deeds are based on a forged grant deed, and so she has alleged that the trust deeds are void or voidable. (See *Schiavon v. Arnaudo Brothers* (2000) 84 Cal.App.4th 374, 381.) The trust deeds potentially remain a cloud on

her title. Therefore, she has alleged serious injury to her. (Civ. Code, § 3412.) Although the first amended complaint does not identify the defendant in the first cause of action and because the allegations about whether the trust deeds were cancelled are vague, Gail argues on appeal that she will amend her complaint to name BNC as a defendant in this cause of action. Therefore, the trial court erred in sustaining the demurrer to this cause of action and abused its discretion in denying leave to amend. (*Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at p. 39.)

#### DISPOSITION

The judgment is reversed as to the fourth cause of action for intentional infliction of emotional distress as against Breaux only and the first cause of action for cancellation of instruments as against BNC only. With respect to the remaining causes of action, the judgment is affirmed.

The portion of the disposition pertaining to BNC is stayed pending further order of the Bankruptcy Court. The usual time limits apply to the portion of the disposition concerning Breaux. Each party shall bear its own costs of appeal.

#### **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.